

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

**Court of Appeals, District of Columbia,
JANUARY TERM, 1921.**

No. 3489.

718

**PETER C. HARRIS, ADJUTANT GENERAL OF THE
UNITED STATES ARMY, APPELLANT,**

vs.

HARRY H. WALSH.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED JANUARY 7, 1921.

Court of Appeals of the District of Columbia.

JANUARY TERM, 1921.

No. 3489.

PETER C. HARRIS, ADJUTANT GENERAL OF THE
UNITED STATES ARMY, APPELLANT,

vs.

HARRY H. WALSH, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original.	Print.
Caption-----	a	a
Application for rule to show cause-----	1	1
Affidavit of Katharine A. Grace-----	4	2
Spa ad test (duces tecum)-----	6	3
Fiat; marshal's return-----	7	4
Rule on attachment for contempt-----	7	4
Marshal's return-----	8	5
Return of Peter C. Harris, Adjutant General of the United States Army, to rule-----	8	5
Order adjudging Peter C. Harris, Adjutant General of the United States Army, in contempt; judgment; appeal noted-----	11	6
Assignments of error-----	12	7
Designation of record-----	13	7
Clerk's certificate-----	14	8

a Supreme Court of the District of Columbia.

HARRY H. WALSH, PLAINTIFF,	}	Summit County, Court of Common Pleas, State of Ohio. Case No. 31093.
vs.		
MARY H. WALSH, DEFENDANT.		

HARRY H. WALSH, PLAINTIFF,	}	Application for rule to show cause.
vs.		
PETER C. HARRIS, ADJUTANT GENERAL OF the U. S. Army, defendant.		

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the folowing papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Application for rule to show cause.*

Filed November 5, 1920.

In the Supreme Court of the District of Columbia.

HARRY H. WALSH, PLAINTIFF,	}
vs.	
MARY H. WALSH, DEFENDANT.	

Now comes Harry H. Walsh, plaintiff, and sets forth that he is a citizen of the United States, resident in the State of Ohio; that on the 27th day of October, 1920, by virtue of a notice to take depositions on his behalf, duly issued and served in the case of Harry H. Walsh, plaintiff, vs. Mary H. Walsh, defendant, case No. 31093, an application for divorce pending in the Court of Common Pleas of the county of Summit, State of Ohio, dated the 22d day of October, 1920, a subpoena duces tecum, issued out of this court over the signature of Hon. F. L. Siddons, one of the justices of this court, directed to the above-named Peter C. Harris, Adjutant General of the United States Army, directing him to appear at room 701, Colorado Building, Washington, D. C., on the 28th day of October, 1920, at 11 o'clock a. m., in accordance with the terms of said notice, to take depositions, there to give testimony on behalf of said paintiff, and to bring with him and produce as evidence in said case the affidavit of said Mary H. Walsh, wife of said Harry H. Walsh, filed on or about May 8, 1918, in connection with the induction into the military service of the United States of the said Harry H. Walsh, before

2 local board No. 1, Akron, Ohio, serial No. 4563, order No. 2705; that personal service of said subpoena was made on said Peter C. Harris, Adjutant General of the United States Army; that on the day and the hour named in said summons for the taking of said testimony, and the production of said document, the said defendant aforesaid failed to appear, but there appeared instead before the officer named to take said deposition one, L. A. Rosafy, chief of the Selective Service Records Division of The Adjutant General's

office, in charge of the record of registration and induction into service in the Armies of the United States, bringing with him the document named in the subpoena duces tecum aforesaid, which, under instructions of the said Adjutant General, he refused to produce and submit for inquiry and examination under the claim that said document is a confidential record, which shall not, under the law and the regulations relating thereto, be produced and published in response to any subpoena or summons of any court.

Your petitioner further states that the affidavit of Mary H. Walsh aforesaid is competent and material evidence in said case; that it was filed in his own registration case; that he consents to its production and publication, and is entitled thereto; that said affidavit is part of a public record subject to the order of this court, and should have been produced in response to the subpoena aforesaid; that it contains statements by said Mary H. Walsh in regard to his contributions to her support which are in direct conflict with her subsequent statements contained in her pleadings filed in said divorce case, and its production is necessary to the elucidation of the truth; that said

3 Peter C. Harris, Adjutant General, has placed himself in contempt of the process of this court by his refusal to obey the subpoena aforesaid.

Wherefore plaintiff prays that a rule may issue against the said Peter C. Harris, Adjutant General, aforesaid, requiring him to appear before this honorable court and produce the document hereinbefore described for use as testimony in said case, or show cause why he should not be adjudged to be in contempt of court for failure so to do.

HARRY H. WALSH, *Plaintiff*.

By FRED'K C. BRYAN,

His attorney.

DISTRICT OF COLUMBIA, ss:

Frederick C. Bryan, on his oath, says that he is attorney for the aforesaid Harry H. Walsh, plaintiff; that the said Walsh is a non-resident of the District of Columbia and now absent therefrom; that the allegations made in the foregoing pleading from his personal knowledge are true; and that the allegations made on information and belief are true, as he verily believes.

FRED'K C. BRYAN.

Sworn to before me and subscribed in my presence this 4th day of November, 1920.

MORGAN H. BEACH, *Clerk*.

By CHAS. B. COFLIN,

Asst. Clerk.

4

Affidavit of Katharine A. Grace.

Filed November 5, 1920.

In the Supreme Court of the District of Columbia.

In the matter of attachment for contempt against Peter C. Harris, Adjutant General, United States Army, for refusal to respond to subpoena duces tecum:

Katharine A. Grace, a notary public in and for the District of Columbia, on her oath, says that by virtue of a notice dated October

22, 1920, to take depositions on behalf of the plaintiff in Harry H. Walsh, plaintiff, *vs.* Mary H. Walsh, defendant, case No. 31093, pending in the Court of Common Pleas of Summit County, State of Ohio, a subpoena duces tecum was on the 27th day of October, 1920, over the signature of Hon. F. L. Siddons, issued directing Peter C. Harris, Adjutant General, United States Army, to appear at the law offices of Frederick C. Bryan, room 701, Colorado Building, Washington, D. C., at the hour of 11 o'clock a. m., on the 28th day of October, 1920, said place, date, and hour being in strict accordance with such notice to take depositions, there to appear for the purpose of giving his deposition to be used as evidence in the trial of the above case and there to produce the affidavit of Mary H. Walsh, aforesaid wife of the said Harry H. Walsh, filed on or about the 8th day of May, 1918, in connection with the induction into the military service of the said Harry H. Walsh, before local board No. 1, Akron, Ohio, serial No. 4563, order No. 2705; that return was made by the

5 United States marshal of the District of Columbia of personal service of said subpoena upon said Peter C. Harris, Adjutant General, but that said Peter C. Harris, Adjutant General, failed to appear in response to said subpoena and failed to produce the document aforesaid he was directed by said subpoena to produce.

Wherefore she prays that an attachment as for contempt may issue from this honorable court against said Peter C. Harris, Adjutant General, and that he be required within a reasonable time to purge himself of said contempt or show cause why he should not be proceeded against and held to be in contempt of this court for failure to respond to the subpoena aforesaid of this court.

KATHARINE A. GRACE.

DISTRICT OF COLUMBIA, ss:

Katharine A. Grace on her oath says that the allegations contained in her foregoing application made on her personal knowledge are true and that the remaining allegations are made on information and belief and are true as she verily believes.

KATHARINE A. GRACE.

Sworn to before me and subscribed in my presence this 5th day of November, 1920.

[SEAL.]

JOHN F. A. BECKER,
Notary Public, D. C.

6

Spa ad test.

Issued October 27, 1920.

Supreme Court of the District of Columbia.

HARRY H. WALSH } No. 31093 in Summit County,
vs. } Ohio Court of Common Pleas.
MARY H. WALSH. }

The President of the United States to Peter C. Harris, Adjutant General, U. S. A., Greeting:

You are hereby commanded to appear before Katharine A. Grace, notary public, at No. 701 Colorado Building, Washington, D. C., on

Filed December 30, 1920.

In the Supreme Court of the District of Columbia.

HARRY H. WALSH, PLAINTIFF,	} Summit County Court of Common	
v.		Pleas, State of Ohio. Case No.
MARY H. WALSH, DEFENDANT.		31093.

This cause coming on to be heard upon the petition of Harry H. Walsh, above named, the rule to show cause issued herein, and the return of the respondent, Peter C. Harris, Adjutant General, United States Army, to said rule, and upon exhibition to the court of the subpœna duces tecum issued out of this court on the twenty-seventh day of October, A. D. 1920, under and pursuant to the provisions of section 1062 of the Code of Law for the District of Columbia, the affidavit of Mary H. Walsh described in said subpœna, and the affidavit of Katherine A. Grace in support of the petition herein, and it being duly shown to the court that said Harry H. Walsh was, upon his application, duly made to local board number one, in Akron, Ohio, classified for military service under the act of Congress of May 18, 1917, known as the selective service law, in class four, and that after the said affidavit of the said Mary H. Walsh was filed with the said local board the said Harry H. Walsh as a result of said affidavit was inducted into the military service of the United States in class one and his classification in class four set aside by said local board; and upon argument of counsel for the petitioner and
 11 respondent, and after due consideration by the court.

It is, by the court, this 30th day of December, 1920, adjudged and ordered that the respondent, Peter C. Harris, Adjutant General of the United States Army, produce within forty-eight hours of the date hereof the said affidavit of Mary H. Walsh, as required by the aforesaid subpœna duces tecum, and failing so to do the said respondent is hereby adjudged to be in contempt of this court, and thereupon the United States marshal in and for the District of Columbia shall forthwith take said respondent into custody and deliver him to the warden of the United States jail for the District of Columbia for confinement therein for a period of ten days unless within that period he, the said respondent, shall comply with this order or be otherwise discharged according to law, in either of which events he shall be at once released and discharged from said confinement.

* F. L. SIDDONS, *Justice.*

From this order the above-named Peter C. Harris, Adjutant General of the United States Army, in open court notes an appeal to the Court of Appeals of the District of Columbia.

F. L. SIDDONS, *Justice.*

12

Assignments of Error.

Filed December 31, 1920.

In the Supreme Court of the District of Columbia.

HARRY H. WALSH, PLAINTIFF,	}	No. 31093. Summit County Court of Common Pleas, State of Ohio.
<i>vs.</i>		
MARY H. WALSH, DEFENDANT.		

Comes now Peter C. Harris, Adjutant General, United States Army, appellant, by his solicitors, and assigns in error as follows:

The court erred:

1. In holding that the affidavit of Mary H. Walsh, referred to in the subpoena duces tecum issued herein on the twenty-seventh day of October, A. D. 1920, is not confidential under the provisions of the selective service regulations and notes thereto appended, issued by the President of the United States under act of Congress May 18, 1917, and known as the selective service law.

2. In holding said affidavit is not confidential upon considerations of the public policy.

3. In ordering appellant to produce said affidavit for use as evidence in the above-entitled cause.

4. In signing the order of December 30, 1920.

JOHN E. LASKEY,
*Attorney for the United States
in and for the District of Columbia.*

L. R. MASON,
*Assistant Attorney of the United States
in and for the District of Columbia.*

13

Designation of Record.

Filed December 31, 1920.

In the Supreme Court of the District of Columbia.

HARRY H. WALSH, PLAINTIFF,	}	No. 31093. Summit County Court of Common Pleas, State of Ohio.
<i>vs.</i>		
MARY H. WALSH, DEFENDANT.		

Now comes Peter C. Harris, Adjutant General, United States Army, by his solicitors, and designates the following as the record on file in the above-entitled cause:

1. The petition and supporting affidavit of Katharine A. Grace.

2. The subpoena duces tecum issued out of this court the twenty-seventh day of October, A. D. 1920.

3. The rule in attachment for contempt issued herein the fifth day of November, A. D. 1920.

4. Return of the respondent, Peter C. Harris, Adjutant General, United States Army, to petition herein.

5. Order of December 30, 1920.

JOHN E. LASKEY,
*Attorney of the United States
in and for the District of Columbia.*

L. R. MASON,
*Assistant Attorney of the United States
in and for the District of Columbia.*

Service of the above acknowledged this 31st day of December, 1920.

F. C. BRYAN,
Atty. for Harry H. Walsh.

14 *Supreme Court of the District of Columbia.*

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 13, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in the case of Harry H. Walsh, plaintiff, *vs.* Peter C. Harris, Adjutant General of the United States Army, defendant; application for rule to show cause, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 6th day of January, 1921.

[SEAL.]

MORGAN H. BEACH, *Clerk.*

[Indorsed on cover: District of Columbia Supreme Court. No. 3489. Peter C. Harris, Adjutant General of the United States Army, appellant, *vs.* Harry H. Walsh. Court of Appeals, District of Columbia. Filed Jan. 7, 1921. Henry W. Hodges, clerk.]



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAR 18 1921

No. 3489.

Henry W. Hodges
Chalk

**In the Court of Appeals, District of
Columbia.**

JANUARY TERM, 1921.

**PETER C. HARRIS, ADJUTANT GENERAL OF THE
UNITED STATES ARMY, APPELLANT,**

v.

HARRY H. WALSH.

BRIEF FOR APPELLANT.

JOHN E. LASKEY,
United States Attorney, D. C.,

GRANT T. TRENT,
Lieutenant Colonel, Judge Advocate,
Attorneys for Appellant.

TABLE OF CONTENTS.

	Page.
STATEMENT OF CASE.....	1, 2, 3, 4, 5
ASSIGNMENTS OF ERROR.....	5
ARGUMENT.....	5
The act of May 18, 1917.....	7
Rules and regulations.....	9, 10, 11, 12, 13, 14, 15, 16, 17
Character of records, public and private.....	18, 19, 20
Duty to give testimony; general rule; exceptions; common-law and statutory privilege.....	21, 22
Relation between physician and patient somewhat analogous. . .	23
The Government and registrants.....	27, 28, 29
Privilege for communications by informers.....	33
Informers to Board members.....	35, 36, 37, 38
Mary H. Walsh's affidavit.....	40
Termination of the draft, records turned over to Adjutant General for deposit.....	41
Who now determines whether any particular communication is protected by the privilege created by Note 2?.....	44
Selective Service Regulations have force of law.....	55
Conclusion.....	61

CASES AND STATUTES CITED.

<i>Akers, Rex v.</i> , 6 Esp. 125.....	49
<i>Arver v. United States</i> , 245 U. S. 366.....	59
<i>Beyfus, Marks v.</i> , L. R. 25 Q. B. D. 494, 498.....	51
<i>Boske v. Comingore</i> , 177 U. S. 459.....	60
<i>Board of Trustees, Mass. Mutual Life Ins. Co. v.</i> , 144 N. W. 538.....	24
<i>Brodie et al., In re</i> , 128 Fed. 665.....	54
<i>Brown v. Spelman</i> , 254 Fed. 215.....	36
<i>Candy, R. v.</i> , 15 M. & W. 175 (176).....	49
Code of Civil Procedure, N. Y., sec. 834.....	23
<i>Comingore, In re</i> , 96 Fed. 552.....	55
<i>Comingore, Boske v.</i> , 177 U. S. 459.....	60
<i>Davis v. Supreme Lodge K. H.</i> , 165 N. Y. 159, 58 N. E. 891.....	25
<i>Edington v. Insurance Co.</i> , 67 N. Y. 185, 194.....	26
<i>Eliason, United States v.</i> , 41 U. S. (16 Pet.) 291.....	56
<i>Franke v. Murray</i> , 248 Fed. 865.....	59
Greenleaf on Evidence, sec. 247-a.....	23, 24, 32
<i>Grimaud, United States v.</i> , 220 U. S. 506.....	58
<i>Grossman v. Supreme Lodge K. & L. H.</i> , 54 Hun. 637, 6 N. Y. Supp. 821, 823.....	24
<i>Gruaz, Vogel v.</i> , 110 U. S. 311.....	33, 34

	Page.
<i>Insurance Co., Edington v.</i> , 67 N. Y. 185, 194.....	26
<i>Kansas City, Smoot v.</i> , 194 Mo. 513, 92 S. W. 363.....	24
<i>Lamberton, In re</i> , 24 Fed. 446.....	60
2 Lewis' Sutherland Statutory Construction, sec. 636.....	39
<i>McKinley et al. v. United States</i> , 249 U. S. 397.....	59
<i>Marks v. Beyfus</i> , L. R. 25 Q. B. D. 494, 498.....	51
<i>Massachusetts Mut. Life Ins. Co. v. Board Trustees</i> , 144 N. W. 538...	24
<i>Murray, Franke v.</i> , 248 Fed. 865.....	59
<i>Napore v. Rowe et al.</i> , 256 Fed. 832.....	61
<i>Oliver v. Pate</i> , 43 Ind. 132.....	35
<i>Pakas v. United States</i> , 240 Fed. 350.....	56, 57
<i>Pate, Oliver v.</i> , 43 Ind. 132.....	35
<i>Price v. Standard Life & Acc. Ins. Co.</i> , 90 Minn. 264, 95 N. W. 1118.	25
Provost Marshal General, second report.....	30, 31
Questionnaires.....	28, 29
<i>R. v. Candy</i> , 15 M. & W. 175 (176).....	49
<i>R. v. Richardson</i> , 3 F. & F. 693.....	51
<i>Reid, In re</i> , 155 Fed. 933.....	60
<i>Rex v. Akers</i> , 6 Esp. 125.....	49
<i>Richardson, R. v.</i> , 3 F. & F. 693.....	51
<i>Rowe et al., Napore v.</i> , 256 Fed. 832.....	61
Selective Service Regulations.....	9, 10, 11
<i>Smoot v. Kansas City</i> , 194 Mo. 513, 92 S. W. 363.....	24
<i>Spelman, Brown v.</i> , 254 Fed. 215.....	36
<i>Standard Life & Acc. Ins. Co., Price v.</i> , 90 Minn. 264, 95 N. W. 1118..	25
<i>Stegall v. Thurman</i> , 175 Fed. 813.....	60
<i>Supreme Lodge K. H., Davis v.</i> , 165 N. Y. 159, 58 N. E. 891.....	25
<i>Supreme Lodge K. & L. H., Grossman v.</i> , 54 Hun. 637, 6 N. Y. Sup. 821, 823.....	24
<i>Thurman, Stegall v.</i> , 175 Fed. 813.....	60
<i>United States, Arver v.</i> , 245 U. S. 366.....	59
<i>United States v. Eliason</i> , 41 U. S. (16 Pet.) 291.....	56
<i>United States v. Grimaud</i> , 220 U. S. 506.....	58
<i>United States, McKinley et al. v.</i> , 249 U. S. 397.....	59
<i>United States, Pakas v.</i> , 240 Fed. 350.....	56, 57
<i>Vogel v. Gruaz</i> , 110 U. S. 311.....	33, 34
Wigmore on Evidence, sec. 2285.....	22
2286.....	23
2374.....	33, 49
2376.....	44
2380.....	26

In the Court of Appeals, District of Columbia.

JANUARY TERM, 1921.

PETER C. HARRIS, ADJUTANT GENERAL, of the United States Army, Appellant, v. HARRY H. WALSH.	}	No. 3489.
--	---	-----------

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a judgment and order of the Supreme Court of the District of Columbia, adjudging the appellant in contempt of court and ordering him to produce within forty-eight hours a certain affidavit in his possession as custodian of the draft records and to stand committed for a period of ten days should he fail to comply with the order or be otherwise discharged according to law.

On October 27, 1920, there was issued out of the Supreme Court of the District of Columbia a subpoena *duces tecum* commanding the appellant, Gen. Peter C. Harris, to appear before Katharine A. Grace, a notary public at 701 Colorado Building, Washington, D. C., on October 28, 1920, to testify on behalf of the plaintiff in the above-entitled case,

Harry H. Walsh, and to bring with him an affidavit of Mary H. Walsh, wife of the said Harry H. Walsh, filed about May 8, 1918, in connection with the induction into the military service of the plaintiff, Harry H. Walsh, before Local Board No. 1, Akron, Ohio.

Frederick C. Bryan, attorney, filed on behalf of the plaintiff, Harry H. Walsh, in the Supreme Court of the District of Columbia an "application for rule to show cause," subscribed and sworn to on November 4, 1920, alleging that on October 27, 1920, by virtue of a notice to take depositions on behalf of the plaintiff, Harry H. Walsh, duly issued and served on the defendant, Mary H. Walsh, case No. 31903, for divorce pending in the Court of Common Pleas of Summit County, Ohio, a subpoena *duces tecum* was duly issued directed to the appellant, Gen. Peter C. Harris, commanding him to appear at the time and place stated in said subpoena to testify on behalf of the plaintiff and to bring with him the indicated affidavit; that on the day and hour named in said summons the appellant, Harris, failed to appear but there appeared in his stead one L. A. Rosafy, chief of the selective service records division, who brought with him the affidavit named in the subpoena which under instructions of the appellant, Harris, he refused to produce and submit for inquiry and examination under the claim that said affidavit is a confidential record which shall not under the law be produced and published in response to any summons of the court; that the said affidavit is competent and material evidence in said cause now pending in the

Court of Common Pleas, above mentioned; that it was filed in the plaintiff's own registration case; that the plaintiff consents to its production and publication and is entitled thereto, the same being a part of the public records subject to the orders of the court; that said affidavit contains statements by Mary H. Walsh in regard to the plaintiff's contributions to her support which are in direct conflict with her subsequent statements contained in her pleadings filed in said divorce case; and that the production of said affidavit is necessary to the elucidation of the truth. The application closed with a prayer to the effect that a rule may issue against Gen. Harris requiring him to appear before the court and produce the affidavit in question or show cause why he should not be adjudged to be in contempt of court. This application was supported by the affidavit of Katharine A. Grace, subscribed and sworn to on November 5, 1920, in which the affiant set forth the facts in respect of the issuance of the subpoena *duces tecum* and the failure of Gen. Harris to appear and produce the affidavit.

The Hon. F. L. Siddons, associate justice of the Supreme Court of the District of Columbia, issued on November 5, 1920, a "rule in attachment for contempt" ordering Gen. Harris, Adjutant General of the Army, to show cause on Friday November 12, 1920, at 10 a. m., why he should not be adjudged in contempt for his failure and refusal to produce the affidavit described in the subpoena *duces tecum*, provided that a copy of said order and the petition or

application be served upon Gen. Harris on or before the 6th day of November, 1920.

The appellant, Gen. Peter C. Harris, in his response to the application for the rule to show cause and in answer to the rule issued by the Hon. F. L. Siddons, stated under oath that the paper referred to in the said subpoena *duces tecum* is of a confidential nature; that he is prevented from producing the said paper by considerations of the public policy, and by the Selective Service Regulations promulgated by the President of the United States pursuant to the act of Congress of May 18, 1917; and that he therefore prayed to be dismissed.

On December 30, 1920, the Hon. F. L. Siddons, justice, signed, issued, and promulgated the order appealed from, adjudging and ordering the appellant, Gen. Peter C. Harris, Adjutant General of the Army, to produce within forty-eight hours the said affidavit of Mary H. Walsh, and failing so to do adjudged him to be in contempt of court and ordering the marshal to take him into custody and to deliver him to the warden of the United States jail for the District of Columbia for confinement therein for a period of ten days unless within that period he shall comply with the order or otherwise be discharged according to law. The order sets forth among other things that:

it being duly shown to the court that said Harry H. Walsh was, upon his application duly made to Local Board Number One, in Akron, Ohio, classified for military service under the Act of Congress of May 18, 1917,

known as the Selective Service Law, in Class Four, and that after the said affidavit of the said Mary H. Walsh was filed with the said Local Board the said Harry H. Walsh as a result of said affidavit was inducted into the military service of the United States in Class One and his classification in Class Four set aside by said Local Board; * * *."

ASSIGNMENTS OF ERROR.

The court erred:

1. In holding that the affidavit of Mary H. Walsh, referred to in the subpoena *duces tecum* issued herein on the twenty-seventh day of October, A. D. 1920, is not confidential under the provisions of the Selective Service Regulations and notes thereto appended, issued by the President of the United States under act of Congress May 18, 1917, and known as the selective service law.
2. In holding said affidavit is not confidential upon considerations of the public policy.
3. In ordering appellant to produce said affidavit for use as evidence in the above entitled cause.
4. In signing the order of December 30, 1920.

ARGUMENT.

There is no dispute about the facts, though it may be doubted whether the appellant is the proper party as he acts under the orders of the Secretary of War, who is in law the real custodian of the War Department records. We do not urge this point, however, because all parties desire that there shall be a deter-

mination by this court of the very important and far-reaching question involved, viz: Was it the duty of The Adjutant General of the Army to furnish the affidavit demanded, or an official copy thereof? If the question is answered in the negative, as we insist it should be, then the order appealed from must necessarily be set aside and appellant discharged with cost.

The question is one of first impression. We can not cite any authorities directly in point, and must therefore rely upon those which appear to be analagous in principle.

We shall urge and undertake to show (a) that the affidavit in question was obtained by the United States Government in the exercise of its constitutional power to raise armies and for the sole purpose of aiding in a just and equitable determination of the registrant's (Harry H. Walsh's) claim for deferred classification; (b) that said affidavit is a privileged confidential communication, the use of which was expressly limited to the purpose just stated, and remains so unless the affiant consents to a more extensive use thereof; (c) that any demand for the use of the affidavit in any civil action by any person must depend for its success upon the will of the affiant; and (d) that the court below was without jurisdiction, right, or power to adjudge the appellant in contempt for his failure to produce the aforementioned affidavit.

Let it be thoroughly understood at the outset that the appellant, in declining to produce the affidavit of Mary H. Walsh, acted in accordance with what he conceived to be his official and sworn duty in

keeping inviolate the Government's pledge of privilege, and not with any disrespect to the court or with the slightest desire or intention of impeding the due administration of justice.

The purpose of the act of May 18, 1917, together with its amendments and the congressional resolutions, was "to authorize the President to increase temporarily the Military Establishment of the United States" by selective draft in order to cope with the then existing emergency. Beyond declaring who was liable to military service and the conferring upon the boards, when created, certain powers, the act contained little except broad administrative provisions the carrying out of which was delegated almost entirely to the Executive. The President accepted the delegation of power and proceeded at once to erect the machinery of the law, which consisted in the main of the local and district boards, the State executives and the office of the Provost Marshal General, he having vested the Provost Marshal General, on May 22, 1917, with the execution, under the Secretary of War, of so much of the act as related "to the registration and the selective draft." The act and the executive rules and regulations defined with clearness the powers, duties, and obligations of these various tribunals and instrumentalities. It was through this machinery or system that order or priority, based upon considerations pertaining to the individual, the service, and the needs of the nation, was determined.

In investigating any question arising out of or touching the draft it must be constantly borne in mind that the declaration, declaring that a state of war existed between the United States and Germany, put in force the laws of war and the war powers of the Government, which are not to be exercised in time of peace; that thereafter every act of Congress and the President, intended to aid in carrying the war to a successful termination, were acts done under the Constitution and in the exercise of the highest congressional and Executive powers; and that the validity of such acts must be determined accordingly. The line of distinction between what constitutes an exercise of war power and an exercise of peace-time power, under the Constitution, may at other times appear dim, but not in the instant matters.

And furthermore, as the Congress declared that the draft "shall take place and be maintained under" presidential regulations, those regulations are to be justified and upheld by the simple and fundamental principle that the power to perform an act includes by necessary inference the power to do it in any way or by any means not specifically prohibited. If any particular executive regulation is clearly in conflict with the act, it is specifically prohibited. Otherwise it is not, and is therefore within the grant of power. It is, of course, elemental that Congress could not delegate either legislative or judicial powers to the President or his executive agencies. It is, however, equally elemental that Congress could constitutionally confer upon the President and his

executive agencies the power and duty to execute and enforce the provisions of the selective service law and, as an incident thereto, to determine the existence of facts or the state of things upon which the successful operation of the act was made to depend.

With these principles to guide us, we will proceed with the main inquiry.

The rules and regulations of June 30, 1917, were so drawn as to fill the first national quota of 687,000 men out of 3,000,000, although the maximum number available was approximately 10,000,000. Section 27 provided that the records should be open to inspection by any person authorized by any department of the Government or the Provost Marshal; and that "such records shall be open to the examination of the public at such times as will not interfere with the proceedings or work of the Local Boards."

The first draft disturbed to quite an appreciable extent the industrial, economic, and labor balance. The entire original plan was reconsidered and a substantially new set of rules and regulations was promulgated on November 8, 1917, effective on the dates stated in section 2 thereof, and rested upon the principle of classification. It was the purpose of those in charge of the draft "to make a scientific and most complete inventory of our man power with a searching inquiry into the qualifications and industrial and domestic circumstances of each registrant, and to make a scientific classification of their relative

availability for military service and for all the war-time activities of the nation." Each registrant was *required* to file with his local board an executed inventory of his qualifications and circumstances by means of a questionnaire composed of inquiries carefully designed to elicit answers which "shall compel conclusions along the desired lines."

Section 11 of the new rules and regulations, known as the Selective Service Regulations, reads as follows:

All records required by these Rules and Regulations to be filed with and kept by Local and District Boards, Adjutants General, and other persons in connection with the registration, examination, selection and mobilization of registrants under the Selective Service Law, and these regulations, shall be public records and shall be open during usual business hours for public inspection of any and all persons.

Provided, however, That the answers of any registrant concerning the condition of his health, mental or physical, in response to Series II of the questions under the head entitled "Physical Fitness," in the Questionnaire, and other evidence and records upon same subject, and the answers of any registrant to the questions under Series X of the questions under the head entitled "Dependency" in the Questionnaire, except the names and addresses of the persons claimed to be dependent upon such registrant, shall not, without the consent of the registrant, be open to inspection by any person other than mem-

bers of Local and District Boards, examining physicians, members of Medical Advisory Boards, Government Appeal Agents, and other persons connected with the administration of the Selective Service Law and these Rules and Regulations, and United States Attorneys and their assistants, and officials of such bureaus or departments of the United States Government as may be designated by the Secretary of War.

Any person connected with the administration of the Selective Service Law and these Rules and Regulations who shall divulge or impart to any person not entitled under the foregoing paragraph to receive the same, any information contained in the record as to a registrant's physical condition, or as to his answers concerning dependency, as above provided, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not to exceed one year.

The portions of such records as are hereinbefore held to be confidential shall not, without the consent of the registrant, be produced and published in response to any subpoena or summons of any court, except that they may be so produced and published for the purpose of being used in the prosecution of the registrant, or of any person acting in collusion with such registrant, for perjury or for any violation of the provisions of the Selective Service Law or of these Rules and Regulations.

On April 22, 1918, the following additional rules and regulations were promulgated:

1. The question as to whether *all* evidence in the possession of Local and District Boards in connection with claims for deferred classification is subject to inspection by a registrant, or by the public, has recently been brought to the attention of this office from several sources.

2. Under the Selective Service Law and Regulations deferred classification, except in the cases involving outright exemptions under the Act of May 18, 1917, does not exist as a matter of right; the hearing of claims for such classification can not, therefore, be considered, controversial. Boards sit not as referees between registrants and the Government, but as representatives of the Government charged with the responsibility of recruiting an army and, at the same time, of preserving our economic and domestic equilibrium in accordance with prescribed regulations.

3. The spirit and intent of the Selective Service Law and Regulations is that board members shall be in possession of every available fact touching on or pertaining to cases within their respective jurisdictions. No small amount of the information obtained by the boards is of a confidential character. To open to the public *all* information which a board may have in a given case would be a breach of the confidence of the persons who, through interest in the successful operation of the Selective Service Law, have rendered valuable

assistance and would, by discouraging the giving of information, seriously impair the fair and equitable selection of registrants. The public, therefore, should not be given access to the confidential records (of) or reports.

4. A registrant is nevertheless entitled to have access to his questionnaire and the record in his case. But where in the records there are statements or letters which are of a confidential nature, the names of the informants should not be divulged to the registrant without their consent. Their names should be withheld and treated as confidential. The registrant, however, is entitled to be advised of all statements and allegations which are part of the record in his case.

5. Necessary precautions should be taken to prevent a registrant from ascertaining the name, or names, of persons who have given confidential information.

6. Pursuant to the authority granted the President by Section 6 of the Selective Service Law to utilize the services of any and all departments of the United States in the execution of the said Law, the assistance of the Department of Justice in the administration of the draft system has been solicited and has been readily and effectively given. Selective service officials have, however, in many instances failed to realize the confidential character of the records of this Department. It is requested, therefore, that you instruct the draft officials of your state that the reports and records of the Department of Justice are Government records, and must be regarded

strictly confidential, and they are to be employed *only* as indicated by the agents of the said department.

The second edition of the Selective Service Regulations was promulgated on September 16, 1918. There was no change in section 11, except officials of certain other United States Government bureaus were authorized to examine *all* draft records. The second paragraph of section 11, second edition, was amended on January 27, 1920, by the Secretary of War by providing that after the death of any registrant his widow, heirs at law, and legal representative shall be entitled to a certified copy of his answers to the questions in the questionnaire under the head entitled "Dependency," and that a certified copy of the same may be furnished on the request of any person whenever a judge of a court of record shall certify that the facts, matters, and things in that portion of the questionnaire are necessary to the proper administration of justice, provided such certificate of the judge is accompanied by the consent in writing of one of the persons named in the amendment.

The additional rules and regulations of April 22, 1918, appear in "Note 2" under section 12, Selective Service Regulations, second edition, and read as follows:

NOTE 2.—Since under the Selective Service Law and Regulations deferred classification, except in the cases involving outright exemption under the act of May 18, 1917, does not

exist as a matter of right, the hearing of claims for such classification cannot be considered controversial. Boards sit not as referees between registrants and the Government but as representatives of the Government charged with the responsibility of recruiting an Army, and at the same time, of preserving our economic and domestic equilibrium in accordance with prescribed regulations. The spirit and intent of the regulations requires board members to be in possession of every available fact touching on or pertaining to cases within their respective jurisdiction. No small amount of such information is confidential. To open to the public such information would be a breach of the confidence under which persons interested in the successful operation of the Selective Service Law have furnished the information and will discourage giving further information to the consequent serious impairment of the fair and equitable selection of registrants. The public, therefore, should not be given access to confidential records or reports.

A registrant is entitled to access to his Questionnaire and to the record of his case, including the record of his physical examination (Form 1010, p. 227), but where such records contain statements or letters of a confidential nature, other than those offered by himself, the names of the informants should not, without their consent, be divulged to the registrant who is, however, entitled to be advised of all statements and allegations which form part of the records in his case. Ample precaution should be taken to prevent

inconsistent with the terms of this Act." No organ essentially different could have been legally established by the President because the act made the local and district boards the foundation of the selective draft machinery. Funds were made available by the act of Congress of July 11, 1919,

for all expenses necessary for the completion, preservation, and transportation of the records pertaining to the draft, * * *, including the employment of the necessary clerical and other help for duty in the office of The Adjutant General of the Army in connection with the arrangement, operation, and maintenance of the files of those records: *Provided*, That such part of this appropriation as may be necessary shall be available for the employment of clerical help required to furnish to the Adjutants General of the several States statements of service of all persons from those States who entered the military service during the war with Germany.

**CHARACTER OF RECORDS—PUBLIC AND PRIVATE—
SECTION 11.**

While the first paragraph of section 11, *supra*, declares that all records "shall be public records and shall be open during the usual business hours for public inspection of any and all persons," the proviso restricts the rule both as to the character of the records and as to inspection by making certain parts thereof "confidential" as to all persons and agencies except those mentioned and those agencies which may be thereafter designated by the Secretary of War. The third paragraph makes it a misdemeanor for any

person *connected* with the administration of the law to divulge or impart to any person not entitled to receive the same the contents of the confidential records. And the last paragraph declares that the "records as are hereinbefore held to be confidential" shall not, without the consent of the registrant, be produced in court except for the purpose of being used in prosecuting the registrant or some other person acting in collusion with him for perjury or a violation of the provisions of the act, or the rules and regulations. There is a clear distinction between these two classes of records. It needs no testimony or argument to determine which are public records and which are confidential records. The public records are those which are made available for the use and information of the public. Familiar instances of public records are those in judicial proceedings and where documents are required to be recorded. The confidential records are not "records open to the use of the public." The purpose in making the answers of the registrant to the questions under the heads entitled "Physical fitness" and "Dependency" in the questionnaire and other evidence upon the first named subject confidential, was plainly to promote the successful execution of the act with a minimum disturbance to the economic and social life of the nation, and to that end required from each registrant a full disclosure of his qualifications and industrial and domestic circumstances under the Government's pledge that the same "shall be kept inviolate" save only to designated officials and in the manner stated.

**REGULATIONS OF APRIL 22, 1918, AND "NOTE" 2, SUPRA—
OTHER CONFIDENTIAL RECORDS.**

In so far as the case at bar is concerned, there is no essential difference between the regulations of April 22, 1918, and those set forth in Note 2. Each declares that the spirit and intent of the act and regulations requires board members to be in possession of every available fact touching on or pertaining to cases within their respective jurisdiction. "No small amount of such information is confidential. * * * The public, therefore, should not be given access to confidential records or reports. * * * Ample precaution should be taken to prevent a registrant from ascertaining the name, or names, of persons who have given such confidential information." Thus, the part of the "information" here made confidential is not so definitely pointed out as in section 11, *supra*. As to what communications were confidential, both as to contents and identity of the informant in respect of the public and confidential as to identity of the informant in respect of the registrant, were questions to be determined in the first instance during the progress of the draft by the boards.

That the promulgation of these regulations was justified by the then existing conditions can not be doubted. The country was in the midst of the greatest war in history. The military needs of the Nation required that there be provided in every community a list of names of men who would be ready for service at any time. The economic needs of the Nation, while deferring to the paramount military

necessity, required that the men whose removal would interfere with the civic, family, industrial, and agricultural institutions should be taken in the order in which they best could be spared. The draft boards had to do these things and determine these questions. It was necessary for the boards to know all about each registrant and that as quickly as possible. There was no time for the calling of large numbers of citizens to testify in respect of claims for exemption. The people were engaged in more important work. And above all the information could not have been obtained in this manner. The only adequate means left was the establishing of confidential relations between the members of the draft boards on the one hand and the community at large on the other. The confidence was the essential and controlling factor in the relation. As a result the board members received innumerable communications containing valuable information touching the economic and domestic circumstances of registrants and their families. The very nature of things made practically the whole of this information antagonistic to the views entertained by the registrants.

DUTY TO GIVE TESTIMONY—GENERAL RULE—EXCEPTIONS, COMMON LAW AND STATUTORY PRIVILEGES.

It is recognized by the courts and text writers that "the public has a right to every man's evidence" (and this includes facts possessed by physical control as well as facts possessed by mental impression), and that "any exceptions which may exist are dis-

tingly exceptional and are so many derogations from the positive general rule." It is likewise recognized that there are a number of well-established exceptions termed "privileges." The principle of privilege in some cases, as accepted, understood, and judicially developed in the common law, has been embodied in the Federal and State constitutions and in statutes; while other privileges have been created by statutes. Those of the first class best known are these: Privilege against self-crimination and the privileges which protect from disclosure communications between attorney and client, and husband and wife; of the second class are the privileges which protect from disclosure communications between physician and patient, and priest and penitent.

Four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation.

(1) The communications must originate in a confidence that they will not be disclosed;

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

(Section 2285, Wigmore on Evidence.)

In general, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation does not create a privilege. This rule is not questioned to-day. No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice.

(Section 2286, Wigmore on Evidence.)

RELATION BETWEEN PHYSICIAN AND PATIENT SOMEWHAT ANALOGOUS TO THAT WHICH EXISTED BETWEEN THE GOVERNMENT AND REGISTRANTS.

PHYSICIAN AND PATIENT.

Information acquired by physicians while attending patients in their professional capacity was not, as we have said, privileged at common law, and the same rule now prevails where not changed by statute. The privilege, however, has been created by statute in many jurisdictions. The New York Statute may be cited as typical. It provides that:

A person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.

(Sec. 834, Code of Civil Procedure, N. Y.)

As to the scope of the privilege Mr. Greenleaf, Volume 1, section 247 says:

The privilege thus established is usually made to apply to such communications only as are necessary for obtaining the medical advice. Whether it includes all facts learned by observation or otherwise, or merely the

verbal communications of the patient, is generally not left doubtful by the statute, the former and broader rule being the usual one. It is properly held that an implied qualification exists, similar to that in the case of attorneys not exempting communications made while preparing or committing a crime or fraud. The communication will not be privileged if made under circumstances negating its confidentiality; as where the physician has been asked to attest a will, or has been sent by the opponent to examine the person's condition, or after the relation of medical adviser has ended.

What is or what is not a privileged communication within the meaning of statutes of this nature is primarily a question of law for the court to determine when it is sought to introduce evidence as to which the privilege is claimed.

It has been held that to bring the cases within the statute it is sufficient that the person attended as a physician upon the patient and obtained his information in that capacity. (*Grossman v. Supreme Lodge K. & L. H.*, 54 Hun. 637, 6 N. Y. Supp. 821, 823), and that information acquired by the physician by looking at the patient, or by examination, is as much within the statute as are the verbal communications which take place between them. *Smoot v. Kansas City*, 194 Mo. 513, 92 S. W. 363.

In *Massachusetts Mutual Life Insurance Co. v. Board of Trustees*, 144 N. W. 538, it was held that the records of a public insane asylum containing in-

formation concerning the mental and physical condition of a patient, obtained by physicians in their professional character for the purpose of determining the proper treatment, were privileged and not open to inspection as public records, notwithstanding the fact that the State statute (Michigan) provided that officers having the custody of public records should furnish proper and reasonable facilities for their inspection and examination.

And in *Davis v. Supreme Lodge, K. H.*, 165 N. Y. 159, 58 N. E. 891, where records of a board of health were sought to be used, and it was attempted to prove the cause of a person's death by the physician's certificate, it was held that such evidence was properly excluded.

In *Price v. Standard Life & Acct. Ins. Co.*, 90 Minn. 264, 95 N. W. 1118, it was sought by an insurance company, which was the defendant in an action to recover upon a policy, to introduce the register of the patients, kept at a hospital, with the entries relating to the deceased. These entries were made by the superintendent in charge in the usual course of business at the hospital, and showed when the patient entered and departed and the nature of his disease.

The information from which they were made was furnished by a physician in charge of the case, after he had had an opportunity to observe the case long enough and knew sufficiently about the patient to determine the disease. The evidence was excluded by the court as being within the statutory restriction.

Mr. Wigmore, volume 4, section 2380, after stating that the privilege has been supported in the home of its origin, cites the report of the Commissioners on Revision of Statutes of New York, wherein the commissioners used this language:

The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger.

In *Edington v. Ins. Co.*, 67 N. Y. 185, 194, the court said:

It is a just and useful enactment, introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sickbed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship.

While both Greenleaf and Wigmore find little to commend the statutes which create the privilege, neither is of the opinion that such statutes are unconstitutional nor that the legislatures should not be considered the judges as to whether or not there existed the fundamental conditions said to be necessary to the establishment of the privilege.

THE GOVERNMENT AND REGISTRANTS.

Under the regulations of June 30, 1917, registrants were called in accordance with their order numbers, physically examined and accepted for full military service or discharged from the draft because not physically qualified for such service. The registrants were not required to make any written statement about their physical fitness. Physical examinations could be suspended until after the hearing of the claims for exemption of those who were entitled to outright exemption. After a registrant had been found physically qualified for full military service he could then file a claim for exemption based on the ground that he had certain designated persons dependent upon his labor for support or that he was engaged in a necessary industry. If he substantiated his claim, he was entitled to a certificate of discharge. There was no necessity for the establishment of confidential relations between the boards or the Government and the registrants in respect of the physical fitness of the registrants or their domestic circumstances. The Government wanted only physically qualified men for active military service, although recognizing at the same time that it would be advantageous to the public to discharge those whose dependents would suffer if they were taken.

The whole plan was reconsidered for the reasons heretofore stated and a new set of rules and regulations were promulgated. The questionnaire then became the basis of the examination, classification, and selection. It was the duty of every local board

to mail to the last-known address of each registrant a questionnaire and it was likewise the duty of each registrant to return the questionnaire to his local board, answered and sworn to in strict accordance with instructions. It was a penal offense to make false claims in the questionnaire. The failure to return the questionnaire was not only a misdemeanor, punishable by imprisonment for one year, but also caused the registrant to be placed in Class I and thereafter automatically inducted into the service. The questionnaire consisted of a number of questions, divided into 12 series of questions. Series No. 2 was entitled "Physical Fitness" and consisted of 6 questions. The instructions were these:

Every registrant must answer the first two questions. If he answers the second question "Yes" he need not answer the remaining questions. If he answers the second question "No" he must answer all the questions. He must sign his name at the end of this series of questions.

The first question relates to the height and weight of the registrant and the second question reads: "Are you in sound health mentally and physically?" If the registrant answers this question "No," he must, as stated in the instructions, answer the four other questions. These four questions, together with their subdivisions, were intended to bring out a full statement touching the registrant's physical fitness in every particular. He was required to state whether or not he was an inmate of an asylum, hospital, or

other institution on account of any physical, mental, or nervous disease, disorder, or injury. He was also required to describe any ailment or physical deficiency he may have; such as epileptic, paralytic, withered or deformed limbs, etc.

Series 10 is entitled "Dependency" and the instructions read in part as follows:

Every registrant must answer the first question. If he answers "No" he need not answer the remaining questions or sign his name. If he answers "Yes" he must answer all the questions and sign his name.

There are 31 questions in this series, all relating to the registrant's financial and domestic circumstances and to the condition of his dependents. He must state the names of each dependent and the relation which he bears to them; whether the claimed dependent children are his own or not; when he first began contributing to their support; his total income from all sources during the last year; a full statement of his property, both personal and real; the amount of taxes paid and whether any of his property was encumbered; whether his wife had been employed or whether she was trained or skilled in any calling, the condition of her health, and whether he or his wife live with either of their parents; and the amount per month he considered necessary for the support of his dependents.

All this information, which is generally considered to be purely personal, in which the public has no right, title, or interest, was compulsorily obtained by

the Government in the exercise of its war powers. The patient is compelled to submit to the examination and treatment by the physician in order that his ills may be cured or, not infrequently, to save his life. In these respects the situation of the registrant to the patient is somewhat analogous.

The Government's reasons for making such a searching and far-reaching inquiry into the physical fitness and domestic and financial circumstances of the registrants were apparent. Thousands of registrants found to be physically deficient for full military duty in the combatant forces were placed in Class I and given limited military service, taking the places of able-bodied men who immediately took their places in the front line.

Again, the information contained in the answers of the registrants to the questions under series 10 entitled "Dependency" very materially aided the draft authorities in providing for the great increase in the number of men to be inducted into the service, and that with the minimum disturbance to the economic and social life of the Nation. In fact, it was that information which, to a very great extent, caused the authorities to prescribe and promulgate on May 17, 1918, the "Work or Fight Order." By far the largest number of registrants affected by this order were those who had been given deferred classification on the grounds of dependency. On this point the Provost Marshal General, at page 75 of his second report, said:

Another class of fruitless immunes was represented by those who obtained deferment in Classes II, III or IV on grounds of dependency, but who were not engaged in productive industries. Those deferred classes were meant to protect domestic relations and also economic interests. But thousands, if not hundreds of thousands, of men thus deferred for dependency were in obviously non-effective occupations and thus their deferment served no economic war purpose whatever.

It has been suggested that if section 11, *supra*, did in fact create a privilege in respect of the parts of the records declared to be confidential, such privilege was effectively destroyed by the numerous qualifications provided in the section. This suggestion is entitled to little, if any, weight. In the first place the confidential information was furnished for the express purpose of being examined and considered by those connected with the administration of the Act and the rules and regulations. The "information" was not confidential as to them during the progress of the draft. Next are the United States attorneys and their assistants and the officials of such bureaus or departments of the United States Government as may be designated by the Secretary of War. As to these officials the confidential information partakes of the nature of State secrets and the principle of privilege created by the section is not otherwise affected thereby. The express qualification stated in the last paragraph of the section is nothing more than the recognition of the well-established rule that

communications are not privileged, when such communications are for an unlawful purpose, having for their object the commission of a crime. Even if this qualification had not been expressed it would have been implied. (1 Greenleaf on Evidence, sec. 247a, and the cases cited.) The privilege created by the section and as thus qualified is the registrant's and subject to his right to waive it, or in case of his death, perhaps subject to the choice of the party who may be said to stand in the place of the deceased and whose interests may be affected by the disclosure, should it be held that the Secretary of War was without authority to amend or change the regulations, as he did on January 27, 1920, because the process of increasing the Military Establishment by selective draft had long since terminated.

That section 11, *supra*, created a qualified privilege subject to the control of each particular registrant, and that the privileged records are not subject to the orders of the court for discovery, inspection, and use, there can be no serious doubt, provided of course the President had the power to prescribe or, let us say, enact said section. The question whether the section has the force of a Federal statute will be inquired into under the appropriate subheading.

We have discussed at some length the provisions of section 11, *supra*, for the purpose of showing the gradual development of the selective draft system and the necessity for the taking of the important steps indicated.

**PRIVILEGE FOR COMMUNICATIONS BY INFORMERS TO
OFFICIAL PROSECUTORS ANALOGOUS TO THAT FOR
COMMUNICATIONS BY INDIVIDUALS TO DRAFT BOARDS**

INFORMERS TO OFFICIAL PROSECUTORS.

Section 2374 (*f*) Wigmore on Evidence, volume 4, reads:

A genuine privilege for communications, on the fundamental principle of privilege (*ante*, sec. 2285), must be recognized for the communications made by informers to official prosecutors, because such communications ought to receive encouragement, and because that confidence which will lead to such communications can be created only by holding out immunity from a compulsory disclosure of the informant's identity; * * *. The privilege applies only to the identity of the informant, not to the contents of his statement as such, * * *. If the identity of the informer is known and admitted, then there is no reason for pretended concealment, and the privilege of secrecy would be merely an artificial obstacle to proof. The privilege applies to communications to such officers only as have a responsibility or duty to prevent public wrongs, and not to officials in general. The privilege applies only to communications concerning third persons' misdoings, * * *. (5) Even where the privilege is strictly applicable, the trial Court may compel disclosure, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony; * * *."

In *Vogel v. Gruaz*, 110 U. S. 311 (*Vogel, Executor, v. Gruaz*), Gruaz brought action against Bircher to

recover damages for the speaking and publishing of false, malicious, scandalous, and defamatory words, charging the plaintiff with being a thief, etc. Three witnesses for the plaintiff gave evidence tending to prove the speaking to them by the defendant of more or less of the words complained of; and afterwards C. L. Cook testified that he was State's attorney and that Bircher communicated with him while he was holding that position touching the question of larceny. He was permitted to state, over the objection of counsel for the defense, the substance of Bircher's conversation. The court reversed the judgment, saying, among other things, that:

We are of opinion that what was said by Bircher to Mr. Cook was an absolutely privileged communication. * * *. Public policy will protect all such communications, absolutely, and without reference to the motive or intent of the informer or the question of probable cause; the ground being, that greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them. * * *. But there is another view of the subject. The matter concerned the administration of penal justice, and the principle of public safety justifies and demands the rule of exclusion. * * *. It makes no difference that there was evidence of the speaking of the same words to persons other than Mr. Cook, and that the speaking of them to Mr. Cook was not the sole ground of action or of recovery.

Oliver v. Pate, 43 Ind. 132, cited by the Supreme Court of the United States in *Vogel v. Gruaz*, *supra*, was an action for malicious prosecution. The appellant was a witness in his own behalf, and voluntarily testified to the statements made by him to the prosecuting attorney, and professed to state fully all that was said. The prosecuting attorney testified, over objection, in relation to the conversation and what it was. His testimony was different from that of the appellant. The court, after observing that the object in extending to the appellant the privilege is that his communications shall not be disclosed without his consent, said (p. 143):

It is because he testifies and voluntarily discloses the confidential communication, that he waives the privilege and consents that the attorney may be a witness against him, and not because he testifies as a witness in the cause.

INFORMERS TO BOARD MEMBERS.

The draft boards did not sit as referees between registrants and the Government but as representatives of the Government charged with the responsibility of raising armies and, at the same time, of preserving our economic and domestic equilibrium in accordance with the regulations. The hearing of claims for deferred classification was therefore not considered controversial. The boards were executive agencies of a high order and had the power "to hear and determine, subject to review as hereinafter provided, all questions of exemption under this

Act.” Congress “intended to give the local boards,” says the Court in *Brown v. Spelman*, et al., 254 Fed. 215, “the widest possible latitude for the purpose of informing themselves concerning the truth or falsity of the statements made under oath by registrants, and that the boards are not to be in any way restricted to what would be competent legal evidence in any judicial proceeding.”

Thus, we had important tribunals which necessarily had to establish confidential relations with that immense number of people, both men and women, who were interested in the successful operation of the selective service law. The communications between the boards and these people originated in a confidence that they were not to be disclosed. The element of confidentiality was absolutely essential in securing the desired information. The disclosure, during the process of classification, of the confidential communications would have resulted in irreparable injury to the Government. But the mere fact that the communications were made in confidence did not create a privilege. And now, passing over the question whether or not the confidential communications between the boards and the people should be considered privileged upon the broad ground of public policy, and that in the absence of legislative command, we will inquire whether the regulations of April 22, 1918, Note 2, *supra*, did in fact and in law create such a privilege.

Those regulations provide that “The public, therefore, should not be given access to confidential records or reports” containing information “touch-

ing on or pertaining to cases within their [the board members] respective jurisdiction." Both the identity of the informant and the contents of the communication are here included. While a registrant was entitled to access to his questionnaire and the record of his case and "to be advised of all statements and allegations [of a confidential nature] which formed part of the records in his case," the regulations declare that "the names of the informants should not, without their consent, be divulged," and that "ample precaution should be taken to prevent a registrant from ascertaining the name or names of persons who have given such confidential information." Only the identity of the informant is here included.

The regulations leave no room for doubt either as to the subject matter to which the privilege, if it be a privilege, extends or to whom the communications must be made. It is confined to communications containing information or facts touching on or pertaining to cases, within the jurisdiction of the particular board, involving questions of exemption or deferred classification and to communications to members of the boards. Whether the privilege is further limited to communications which militated against the claims of the registrants for deferred classification or not is of no special importance at this time, because that class of communications is at least certainly covered by the privilege. There can be no doubt about the soundness of this proposition. That was the very kind and character of

information which the boards desired and which the Government encouraged the people to furnish. All know from the very nature of things that the boards did not have to seek information which would tend to substantiate claims for deferred classification.

Did the President intend to create a privilege, although qualified in the manner hereinbefore stated, which protects from compulsory disclosure the confidential communications of the individual citizen addressed to the boards or the board members? In answering this question, we must look first at the language used. That relating to the public is this: "The public, therefore, should not be given access to confidential records or reports," and that which refers to the registrant is essentially the same. The regulations containing this language were addressed primarily to the members of the boards and the other persons connected with the administration of the act and the rules and regulations. Did the President intend to impose upon these officials and employees a positive and absolute duty, or merely to leave compliance with that part of the regulations optional with them? It might be argued that the latter was intended, otherwise the President would have used the same positive language as he did in section 11, *supra*, in creating the privilege which protects from compulsory disclosure the answers of the registrants to certain designated questions and other records containing information touching the physical fitness and the dependents of regis-

trants. It is there declared that these parts of the records "shall not, without the consent of the registrant, be open to inspection by any person" other than those designated, and that any person connected with the administration of the draft who shall divulge such information shall be guilty of a misdemeanor and punished accordingly.

It is true that the language used in Note 2 is not so positive as that used in section 11 and that there is no provision in the note penalizing those connected with the draft who should divulge the confidential records in violation of the regulations. But the words "should not," when considered with the strong statement of the President, to the effect that to open to the public those communications would not only be a breach of confidence on the part of the Government but would also discourage the giving of further information to the serious impairment of the selective system, show that the President intended to impose an imperative duty upon the administrators of the draft and to create a real and effective privilege in respect of the confidential information and the identity of the informers. "A direction contained in a statute, though couched in merely permissive language, will not be construed as leaving compliance optional when the good sense of the entire enactment requires its provisions to be deemed compulsory." (2 Lewis's Sutherland Statutory Construction, sec. 636, citing *Carbaugh v. Sanders*, 13 Pa. Supr. Ct. 361).

MARY H. WALSH'S AFFIDAVIT.

If the affidavit of Mary H. Walsh was sufficient to cause the plaintiff's local board to change his classification from Class IV to Class I, as stated by the court in the order appealed from, it was, in so far as the draft authorities were concerned, a confidential communication addressed to the members of the board and directly affected a claim for deferred classification pending before the board. A clearer case where the communication falls wholly within the purview of the regulations could hardly be imagined. The board evidently considered the affidavit confidential, both as to its contents and the identity of affiant in respect to the public and as to the identity of the affiant in respect to the registrant; and simply advised the registrant that the board was in possession of information showing that he was not contributing to the support of his wife to the extent and in the manner alleged in his questionnaire. For the board or anyone else to have sanctioned the violation of the Government's pledge of secrecy by divulging the name of the affiant would have invited an open violation of law. The affiant's very life would have been jeopardized. Who knows what acts of violence would have been committed by the registrant if he had known that it was his wife who had caused the change in his classification and his induction into the military service. His filing suit for divorce soon after his discharge gives strong indications as to what course he would have pursued. The wisdom and policy

of the President in creating the privilege which protected the identity of the affiant from compulsory disclosure is apparent. We think that it is not going too far to say that if the privilege had not been created the affidavit would never have been presented. Mrs. Walsh presented the affidavit because she fully realized that it was her duty and also she knew that she would be protected by the draft authorities so long as they remained in possession of the records.

**TERMINATION OF THE DRAFT—THE DISCHARGE OF ALL
DRAFT OFFICIALS AND EMPLOYEES—RECORDS TURNED
OVER TO THE ADJUTANT GENERAL FOR DEPOSIT.**

The dismantling of the draft machinery and the turning over of the records to The Adjutant General of the Army for deposit by direction of the President did not change in the least the character of the records. A part of the records are still "public records" and a part are still "confidential records." The very nature of the facts recorded, together with the Government's solemn pledge of secrecy, make this true. It ought to be accepted without question, that the matters disclosed by the registrants and informants to the draft authorities in confidence can not be compulsorily disclosed at any future time, although the officials to whom the communications were addressed have lost their official character.

It needs no argument, however, to show that the penal provisions of paragraph 3 of section 11, *supra*, did not follow the records into the possession of The Adjutant General because such provisions were, by

express terms, applicable only to persons *connected* with the administration of the law. The administration of the law in that sense has ceased. Not so with the penal provisions contained in the last paragraph of section 11 for the reason that the contrary is clearly stated. Those who violated the provisions of the act or the rules and regulations or the general penal law of the land in the making of the confidential records mentioned in section 11 are not protected by the privilege nor by the rule (the general privilege) which secures one, when on the stand, from becoming the unwilling instrument of his own conviction. It may be true that, after the repeal of the act, no penalty can be enforced nor punishment inflicted for its violation unless some special provision be made for that purpose by statute. The same is true in respect of the persons and penal provisions touching violation of the regulations set forth in Note 2.

That the right extended to those *connected* with the administration of the draft to examine the confidential draft records terminated when they were discharged from that service can not be doubted. The nature of their work carried with it the right, or more accurately speaking, the duty to examine such records. The general authority conferred upon United States attorneys and their assistants to examine the confidential draft records must now be considered to be limited to the purposes stated in the last paragraph of section 11. The authority to continue the examination of the confidential draft records mentioned in Note 2 is by necessary implica-

tion conferred upon the United States attorneys and their assistants for the purpose of prosecution. While authority to examine the confidential records was extended, during the operation of the draft, to various Government agencies, the last being on August 6, 1918, it was expressly declared that "all these examinations are to be made at such times and under such circumstances as will not interfere with the process of classification." (Second paragraph, Note 6, section 11, S. S. R., 2d Ed.) The "process of classification" has long since terminated. The words "all these examinations" are *all* inclusive.

That Congress was of the opinion that the transferring of the draft records to The Adjutant General of the Army for deposit because of the dismantling of the draft machinery did not change the character of those records and that the authority extended to those connected with the administration of the draft to examine the confidential records then terminated, is clearly indicated by the language used in the act of July 11, 1919, *supra*, making funds available for all expenses necessary for the completion, preservation, and transportation of the records; for arrangement, operation, and maintenance of the files of said records in the office of The Adjutant General; and to furnish to the adjutants general of the several States statements of service of all persons who entered the Army during the Great War. Congress was satisfied with the designation as to the character of the records given by the President in section 11 and in Note 2.

WHO NOW DETERMINES WHETHER ANY PARTICULAR COMMUNICATION IS PROTECTED BY THE PRIVILEGE CREATED BY NOTE 2 ?

As we have heretofore indicated, the draft boards determined in the first instance whether or not any particular communication was privileged under Note 2. For all general purposes this power now probably devolves upon the Secretary of War acting through The Adjutant General. But where the compulsory disclosure, through the courts, of a communication alleged or claimed by The Adjutant General to be protected by the privilege created in Note 2, some authority must determine this question before the privilege can be deemed applicable. Who shall make this determination? Obviously, and by analogy with other privileges, the court. (4 Wigmore, on Evidence, sec. 2376, citing secs. 2193, 2271, 2322, and 2550.) Mr. Wigmore, in the same section, holds that naturally the court or judge can not make the determination without seeing and ascertaining what the communication contains and that the examination must take place in private. Such an examination, says Mr. Wigmore in substance, would not only not violate the privilege but must be considered the proper procedure. It necessarily and logically follows that the court or judge will not make public the contents of the communication if he concludes that the communication is a privileged one. If the judge concludes that the communication is not privileged, he should not make the contents of the communication public even in such a preliminary examination, if an

appeal lies from such a holding, before the communication can be introduced in evidence, as in the instant case.

The question now presents itself with considerable force: Upon what grounds did the court rest its decision and judgment, ordering the disclosure of the affidavit of Mary H. Walsh, after having seen the affidavit and having been informed that the communication was addressed to the members of the local board and contained sufficient information to cause a change in her husband's classification from Class IV to Class I?

It was urged that the court's judgment can very well rest upon either one of four grounds, viz: (1) The consent of the plaintiff, Harry H. Walsh, the registrant, that the communication be disclosed and used in his divorce suit; (2) the identity of the affiant, Mary H. Walsh, being known and admitted, the reason for secrecy no longer exists; (3) disclosure is necessary in order to avoid the risk of false testimony and in order that justice may prevail in the divorce suit; and (4) even if it be admitted that the President had power under the act to prescribe and promulgate the Selective Service Regulations, including section 11, *supra*, Note 2, *supra*, forms no part of these regulations, it being merely explanatory of sections 11 and 12.

Counsel for Harry H. Walsh, in presenting the case in the court below, stated:

It will be noted that it is our contention that, while it might have been proper for the

President to promulgate certain rules, it was entirely improper and illegal for The Adjutant General, or any one acting for him, to undertake to further prescribe the conduct of the selective draft, and this is precisely what the officers are attempting to do.

And counsel stated further:

It is certainly a most extraordinary position for the Adjutant General of the United States Army to take, that he will thus interfere with the lawful process of the courts and attempt to defend his position by reference to a consideration of the selective draft Act, the necessity of which has long since passed by.

Justice Siddons, in his informal opinion delivered in this case, used this language:

The regulations upon which the Adjutant General relies are found in the second edition, published by the Government, and special reliance is placed upon Sections 11 and 12 of these regulations. These regulations are fortified by certain notes, which seem to be the summary of interpretative circular letters issued by the War Department from time to time in enforcement of these regulations and under regulation 12 there are one or two such notes, which it is now insisted on behalf of the Adjutant General, form a part of the regulations themselves. The power of the President to formulate these regulations in the administration of the selective service law is undoubted and the regulations themselves, as they appear, without regard to the notes mentioned, seem to be reasonable regulations and properly

designed to aid in carrying out the administration of the Selective Service law. * * *

The application for the production of this document is by the registrant. Any right that he may have had under the regulations in question to the document being considered as confidential, he waives necessarily by his application. * * * I assume that unless the Adjutant General shall feel that he must proceed further with the conclusions announced here this morning, a final judgment will have to be rendered.

That the plaintiff as a registrant made a claim in his questionnaire for deferred classification on the ground that his wife was dependent upon his labor for support; that the board held that the registrant had substantiated that claim; and that the affidavit of the registrant's wife caused the indicated change in the registrant's classification was clearly shown from the pleadings and the court's opinion in this case, especially when considered with the instructions on page 2 of the questionnaire wherein it is declared that a registrant shall be placed in Class IV who has a wife or children mainly dependent on his labor for support and that a married man, with or without children, or father of motherless children who has habitually failed to support his family shall be placed in Class I. The effect of being placed in Class IV was to relieve the registrant from military duty and the effect of being placed in Class I was to render him immediately liable for active military service.

While it is true that the plaintiff, Harry H. Walsh, the registrant, expressly consents to the disclosure and use of his wife's affidavit, such consent can not affect in any manner whatsoever the questions at issue in the case at bar because the privilege created by the regulations of April 22, 1918, Note 2, is not the registrant's but the informant's, and in this instance the privilege belongs to Mary H. Walsh and no one else. It is so provided in the regulations just cited in express and positive terms. The qualified privilege created by section 11 is the registrant's, and this is made so by express language. The rule that the privilege which protects from compulsory disclosure of communications between attorney and client, physician and patient, and informers and prosecuting officers belongs exclusively to the client, to the patient and to the informers is too well established to require a citation of authorities to support it.

As to the identity of the affiant, Mary H. Walsh, being known and admitted, Gen. Harris, appellant, in his answer to the rule to show cause why he should not produce the affidavit or be adjudged in contempt, stated that the paper referred to in the subpoena *duces tecum* is of a confidential nature. The subpoena *duces tecum* called for the production of an affidavit of Mary H. Walsh filed by her with the local board in the case of her husband's claim for deferred classification. So it is admitted that the appellant has possession of the affidavit filed by the registrant's wife. While the identity of the author of the affidavit is to that extent admitted, the contents of the affidavit is nowhere

admitted. But it is alleged that the affiant, Mary H. Walsh, made statements in that affidavit in respect of the registrant's contributions to her support which are contrary to the statements contained in her pleadings in the divorce suit, and the court found that the contents of the affidavit were sufficient to change the registrant's classification.

Mr. Wigmore in section 2374 (*f*), *supra*, says that:

If the identity of the informer is known and admitted, then there is no reason for pretended concealment, and the privilege of secrecy would be merely an artificial obstacle to proof. *R. v. Candy, supra*, illustrates this.

In *R. v. Candy*, cited by Mr. Wigmore, the witness was allowed to be asked whether he was the informer, Rolfe, B.; "That was tried before me; the principle was rather followed than violated by asking that question of B., because it was perfectly clear and admitted that he was the informer, and it went to exclude the notion of anybody else being an informer." The reported case, 15 M. & W., 175 (176), it is said: "The very fact of his [the witness] being 'put forward' as the informer goes far to show that the supposed rule of public policy does not apply; for surely every accused person has a right to the cross-examination of every person who is put forward to depose against him." The case of *Rex v. Akers*, 6 Esp. 125, is cited in the same opinion and it was held that: "The defendant's counsel have no right, nor shall they be permitted, to inquire the name of

of Mrs. Walsh is sought for use in an ordinary civil action, and *that* in the face of an express prohibition against its compulsory disclosure. We admit that a general right exists that each party to a civil action shall have all the evidence which goes to weaken his opponent's case and strengthen his own and that that right can not be set aside but by a real and substantial benefit which ought to exclude such evidence. The legislature is the judge in such matters whether or not the real and substantial benefit exists. Or in other words, whether the evidence should be excluded from motives of public policy or in the interest of the administration of penal justice are questions which must be left to the legislature to determine. The President, occupying in a sense the position of the legislature with powers to act, has determined that the affidavit of Mrs. Walsh should be excluded because it is a privileged communication. The affidavit was, as we have stated, a statement of facts directly connected with the plaintiff's claim for deferred classification, and was one if not the only means of information for the discovery of the real facts relating to that claim.

The word "note" has, as Mr. Webster says, many significations, such as "a short remark; a passage or explanation in the margin of a book, etc." Generally, "notes" appearing under sections in textbooks refer to citations of authorities and sometimes quote opinions of text writers and courts. Such notes may not be considered an integral part of the section or text. But this is not the case in respect of the "note," *supra*.

The regulations contained in that note were promulgated for the first time on April 22, 1918. Those regulations were carried forward and appear in Note 2 under section 12 of the second edition of the Selective Service Regulations. Whether Note 2 must be construed as repealing the regulations of April 22, 1918, is, as we have said, immaterial in so far as the question under consideration is concerned, because in these respects both are substantially the same. Paragraph 1, section 5, of the Selective Service Regulations, second edition, *supra*, expressly declares that "all notes" are a part of and have the same force and effect as the rules and regulations themselves. The President prescribed the rules and regulations and the "notes." If the President had seen fit to insert the regulations contained in Note 2 in a new and original section in the second edition such regulations would not have been open to the objection now being considered. The reason he did not do this is found in the fact that the regulations had been previously prescribed and it was desired that a reference to the origin should be inserted for the information and guidance of the draft authorities. The contention that Note 2 forms no part of the regulations is so clearly without merit that it is difficult to answer it. If the President had authority to prescribe the regulations, the form in which they appeared is of no importance. The regulations appearing in the notes in the second edition are just as much a part of the regulations themselves as any section in that edition.

Regulations and those prescribed by the Secretary of War were made in the exercise of the constitutional power to raise armies to meet an existing emergency and not by virtue of general authority vested in the President and the head of the department to make rules and regulations which relate to the government of the department, the conduct of its officers and its employees, and the custody, use, and preservation of its records and papers.

In *United States v. Eliason*, 41 U. S. (16 Peters) 291, 302, the court said:

The power of the executive to establish rules and regulations for the government of the army is undoubted. The very appeal made by the defendant to the fourteenth section of the sixty-seventh article of the Army Regulations is a recognition of this right. The power to establish implies, necessarily, the power to modify, or repeal, or to create anew. The Secretary of War is the regular constitutional organ of the President, for the administration of the Military Establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. Such regulations can not be questioned or defied, because they may be thought unwise or mistaken.

And in respect to the power of the Postmaster General to prescribe and promulgate rules and regulations which have the force of law, the case of *Pakas*

v. *United States*, 240 Fed. 350, is directly in point. Pakas used checks which he knew had been taken by one Broder from private letter boxes in the city of New York. Section 194 of the Criminal Code (act of Mar. 4, 1909, Comp. St. 1913, sec. 10364) provides, among other things, that:

Whoever shall steal, take, or abstract, or by fraud or deception obtain, from or out of any mail, post-office, or station thereof, or other authorized depository for mail matter, * * *.

shall be punished, etc. It was urged that a private letter box was not within the terms of the Criminal Code because such a box is not "other authorized depository for mail matter." The Postmaster General had, prior to the taking of the checks out of the private letter boxes by Broder and their use by Pakas, designated private letter boxes as "letter boxes for the receipt or delivery of mail matter within the meaning of the act of March 4, 1909." It was also urged that such a regulation, being an attempt to make "that a crime which was no crime before" was void. In disposing of this contention the Circuit Court of Appeals, Second Circuit, said:

This is very interesting, and would be unanswerable if the Postmaster General was undertaking on his own authority to enact a criminal law. We do not think he has done so. What he has done is to determine what shall be regarded as a depository for mail; and when he did that the depository so designated

became an "authorized depository," a depository authorized by the Post Office Department as a receptacle for the receipt or delivery of mail matter. Mail matter, while continuing as such, is "property" appertaining to the Post Office Department, and the Postmaster General is authorized by the statute to prescribe requirements not inconsistent with law for its custody and preservation. This he has done, and nothing more.

In *United States v. Grimaud*, 220 U. S. 506, cited by the Circuit Court of Appeals, in *Pakas v. United States, supra*, the defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations prescribed by the Secretary of Agriculture. They demurred on the ground that the Forest reserve act of 1897 (act June 4, 1897, c. 2, 30 Stat. 11), was unconstitutional, in that it delegated to the Secretary of Agriculture power to establish regulations concerning the use of such forest reservations and made a violation thereof a penal offense. The Supreme Court reversed the lower court, and held the demurrers should have been overruled. The Supreme Court admitted that Congress could not delegate legislative power, but held that authority to make administrative rules was not a delegation of legislative power, and that such rules were not raised from an administrative to a legislative character because the violation thereof was punished as a public offense.

The constitutionality of the selective service law was settled by the Supreme Court of the United States in the case of *Arver v. United States*, 245 U. S. 366. It was there held that the act is not open to the constitutional objection as delegating Federal power to State officials, or as vesting administrative officials with legislative discretion or as conferring of judicial power upon such officials.

In *Franke v. Murray*, 248 Fed. 865, it was urged "that Congress had no power to authorize the President to make any rules and regulations which should have the effect of law, that being a delegation of legislation which is not permissible under the Constitution." The court disposed of this contention thus: "As to the last claim, it is sufficient to say that it was adversely disposed of by the Supreme Court in *Arver v. United States*, 245 U. S. 366."

In *McKinley et al v. United States*, 249 U. S. 397, the plaintiffs in error were indicted, convicted, and sentenced upon an indictment for violation of a regulation of the Secretary of War made under the authority of the act of May 18, 1917. The indictment charged that the plaintiffs did unlawfully keep and set up a house of ill fame within five miles of a certain military station of the United States. In disposing of the contention that Congress had no authority to pass the act, the court said:

Congress having adopted restrictions designed to guard and promote the health and efficiency of the men composing the army, in a matter so obvious as that embodied in

the statute under consideration, may leave details to the regulation of the head of an executive department, and punish those who violate the restrictions. This is also well settled by the repeated decisions of this court. *Buttfield v. Stranahan*, 192 U. S. 470; *Union Bridge Co. v. United States*, 204 U. S. 364; *United States v. Grimaud*, 220 U. S. 506.

In *Boske v. Comingore*, 177 U. S. 459, the appellee had been committed by the State court in Kentucky for contempt. His alleged contempt consisted in his refusal to produce certain records of the Internal Revenue Bureau. In refusing to produce the records appellee relied upon regulations of the Treasury Department providing that the records in question were confidential and should not be produced. The appellee sued out a writ of habeas corpus to escape the commitment, and was discharged by the District Court of the United States. The action of said court was affirmed by the Supreme Court of the United States on the ground that the Treasury regulations had the force and effect of law, and that appellee was justified in his refusal to produce the papers under the order of the Kentucky court.

See also:

In re Lamberton, 124 Fed. 446.

Stegall v. Thurman, 175 Fed. 813.

In re Reid, 155 Fed. 933.

In so far as we are advised, no court has set aside the Selective Service Regulations or any part of them as being *ultra vires*, except the United States District

Court for the district of Montana. That court, in the matter of the application of John Napore (Napura) for a writ of habeas corpus, after stating that draft boards were at first directed to exclude nondeclarant aliens though they desired to be drafted, held: "The new rules are otherwise and even direct that non-declarant aliens shall be drafted (1) if they do not claim exemption, (2) as a penalty for delinquency. It is hardly necessary to point out that these rules are inconsistent with the draft law and so are void." (Quotation from the printed record, as the opinion appears not to have been reported.) The district court held that the petitioner was not in the military service and ordered that he be discharged from custody. The United States Circuit Court of Appeals, Ninth Circuit, reversed the district court and remanded the cause with instructions to dismiss the writ and remand Napore to custody. *Napore v. Rowe et al.*, 256 Fed. 832.

CONCLUSION.

We think enough has been said to acquaint the court with the very great importance of the issues presented in this case. The war power of the Government was not limited to the defeat of the enemy on the battlefield. It carried with it inherently the power to preserve "our economic and domestic equilibrium." And in doing so, the Government, through its Chief Executive and Commander in Chief of the Army and Navy, gave its solemn pledge to Mrs. Walsh and hundreds of thousands of other

citizens that if they would aid the draft boards in the just and equitable disposal of the millions of claims for deferred classification by furnishing them confidential information touching the financial and domestic circumstances of the registrants residing with them or in their immediate communities, it would not divulge such information, without their consent, and that the same shall be used only in furtherance of the objects for which it was acquired. The production of Mrs. Walsh's affidavit in the manner herein sought would not only violate that pledge but would at least embarrass Mrs. Walsh and would seriously prejudice the public interest by discouraging the giving of like information should it again become necessary to raise troops by draft. We, therefore, respectfully submit that the order appealed from should be reversed with costs.

JOHN E. LASKEY,
*Attorney of the United States in
and for the District of Columbia.*
GRANT T. TRENT,
*Lieut. Colonel, Judge Advocate,
Attorneys for Appellant.*

○

~~COURT OF APPEALS~~
DISTRICT OF COLUMBIA
FILED

APR 6 - 1921

IN THE

Henry W. Hodges.
Clerk

Court of Appeals, District of Columbia

JANUARY TERM, 1921.

No. 3489.

PETER C. HARRIS, ADJUTANT GENERAL OF THE UNITED
STATES ARMY, *Appellant*,

vs.

HARRY H. WALSH, *Appellee*.

BRIEF FOR APPELLEE.

FREDERICK C. BRYAN,
Attorney for Appellee.

IN THE
Court of Appeals, District of Columbia

JANUARY TERM, 1921.

No. 3489.

PETER C. HARRIS, ADJUTANT GENERAL OF THE UNITED
STATES ARMY, *Appellant*,

vs.

HARRY H. WALSH, *Appellee*.

BRIEF FOR APPELLEE.

This case grows out of a divorce proceeding pending in a court of competent jurisdiction in the County of Summit, State of Ohio, wherein Harry H. Walsh is plaintiff, and Mary Walsh is defendant. The petition filed in the case charges the defendant with gross neglect of duty and extreme cruelty in that she caused plaintiff to be inducted into the military service of the United States by a false affidavit filed with the Draft Board in Akron, and that she did this for the purpose

of inducting him into the army in the hope that some casualty of the service would prevent his return and thereby give her control of his property.

It further appears that before the defendant had filed this false affidavit she had filed a true statement setting forth the facts of her actual dependency on the plaintiff, by reason of which affidavit the plaintiff was granted deferred classification in Class IV. It is charged in the divorce petition that the second affidavit, production of which is sought in this proceeding, is false and perjured, and that its production is necessary in order to establish the truth.

The court below in rendering its opinion after setting forth the facts substantially as above repeated, continued as follows:—

“It is obvious that a knowledge of the existence of this affidavit in the archives of the War Department was had by petitioner, and that the general tenor of the affidavit was also known. It is the opinion of the Adjutant General that this affidavit is such a paper or document as on the ground of public policy and in view of the provisions of the Selective Service regulations should not under the circumstances be required to be produced. However, in all cases where this privilege is invoked a duty rests upon the judge to determine whether it is well founded.

“The regulations upon which the Adjutant General relies are found in the second edition, published by the Government, and special reliance is placed upon Sections 11 and 12 of these regulations. These regulations are fortified by certain notes, which seem to be the summary of interpretive circular letters issued by the War Department from time to time in the enforcement of these regulations and under regulation 12 there are one or

two such notes, which it is now insisted on behalf of the Adjutant General, from a part of the regulations themselves. The power of the President to formulate these regulations in the administration of the Selective Service law is undoubted and the regulations themselves, as they appear, without regard to the notes mentioned, seem to be reasonable regulations and properly designed to aid in carrying out the administration of the Selective Service law.

“Section 11 is significant. It provides that all records required by these rules and regulations to be filed with and kept by local and district boards, and Adjutants General, and other persons in connection with the registration, examination, selection and mobilization of registrants under the Selective Service law and these regulations, shall be public records and shall be open during usual business hours for public inspection of any and all persons, *Provided*, however, that the answers of any registrant concerning the condition of his health, mental or physical, in response to series II of the questions under the head entitled ‘Physical Fitness’ in the questionnaire, and other evidence and records upon the same subject, and the answers of any registrant to the questions under Series X of the questions under the head entitled ‘Dependency’ in the questionnaire, except the names and addresses of the persons claimed to be dependent upon such registrant, shall not, without the consent of the registrant, be open to inspection by any person other than members of local and district boards, examining physicians, members of medical advisory boards, government appeal agents, and other persons connected with the administration of the Selective Service law and these rules and regulations, and United States Attorneys and their assistants, and officials of such bureaus or departments of the United States government as may be designated by the Secretary of War.

“It will be noted the regulations give a character to these various records as public records open during usual business hours for public inspection of any and all persons, with certain limitations found in the proviso that has been read, and in which limits are confined certain of the records, and as to them apparently leaving it to the registrant concerned whether they shall be open to public inspection.

“Section 12 provides that whenever any registrant or other person (except one of the class of persons named in the proviso of the foregoing Section 11) applies to a local or district board to inspect any of the records of such boards, such registrant or other person shall not be permitted to search through such records, but it shall be the duty of members or clerks of local and district boards and other persons having the custody of such records to discover, open and point out to the registrant or other person the portion of the record containing the information requested by such person so applying; subject to the limitations as to disclosures provided in the foregoing Section 11.

“This regulation simply restricts the method by which persons having obtained permission to consult these records shall be permitted to do so. Then follow, under Section 12, two of these so-called notes, and Note 2 provides, among other things:

“ “The spirit and intent of the regulation requires Board members to be in possession of every available fact touching on or pertaining to cases within their respective jurisdiction. No small amount of such information is confidential. To open to the public such information would be a breach of the confidence under which persons interested in the successful operation of the Selective Service law have furnished the information and will discourage giving further

information to the consequent serious impairment of the fair and equitable selection of registrants. The public therefore should not be given access to confidential records or reports.

“ ‘A registrant is entitled to access to his questionnaire and to the record in his case, including the record of his physical examination (Form 1010, p. 227), but where such records contain statements or letters of a confidential nature, other than those offered by himself, the names of the informants should not, without their consent, be divulged to the registrant who is, however, entitled to be advised of all statements and allegations which form part of the records in his case. Ample precaution should be taken to prevent a registrant from ascertaining the name or names of persons who have given such confidential information.’

“It is insisted, on behalf of the Adjutant General, that the note now forms a part of the regulation, and that it is by virtue of the declaration found in this note that the Adjutant General rests his declination to produce the affidavit in question.

“Ever since the trial of Aaron Burr this question of the production of a document of privileged character, containing information conveyed to the public officers in the course of their duty, has been regarded by many as a principle which is to be cautiously applied by the courts. In view of the contention whether or not the privileged character of a particular document is to be determined by the custodian of the document, the public official, or by the court, undoubtedly it would be safe to hold that the courts must be, in most cases at least, the judge of whether or not the document or information in question possesses the privileged character that is claimed for it.

“In this case we have no criminal prosecution pending against the registrant. The application

for the production of this document is by the registrant. Any right that he may have had under the regulations in question to the document being considered as confidential, he waives necessarily by his application. There is, as far as the court is advised, no proceeding pending against the affiant of a criminal character. There has been a divorce suit pending between the petitioner herein, the plaintiff in the divorce suit, and his wife. Is the affidavit under those circumstances entitled to be given the scope which is claimed here by the Adjutant General? What public danger is to be apprehended if the affidavit should be produced in this proceeding? The court does not conceive that the interests of the government would be jeopardized at all. Is it conceivable that there might arise a condition where the court would be justified in refusing to permit a defendant on trial in a criminal case to insist upon the right to know the nature of the criminal act charged? In this case the affidavit is known, the contents are known, the maker is known.

“The conclusion reached is this: I think the petitioner is entitled to have the affidavit produced.”

While Section 11 did not provide for the consent of other parties when other parties instead of registrant had furnished confidential information, Note 2 of Section 12 (which was written subsequently) provides that the consent of such parties is necessary. This note was no part of the original regulation. Did the President ever authorize by direct order the withholding of such information or was it the unauthorized action of the War Department? The action of the Adjutant General in withholding the information is clearly inconsistent with the note originally promulgated which provided substantially that the registrant was entitled to full information. What proof is there that the Presi-

dent ever had actual knowledge of the issuance of this Note 2 to Section 12? If he did not the action of the Adjutant General in withholding this affidavit is unlawful. In any event his action is unreasonable because the reason for the rule in this case, if it ever existed, has ceased to exist. There is no good reason to preserve by judicial decree as confidential information which has long ceased to be confidential but is common property. The court below has seen the affidavit. The chief of the Selective Service division of the War Department produced the affidavit before the Notary commissioned to take the testimony of the Adjutant General and in court. There is every prospect that it is the common property of the Adjutant General's office. In Wigmore on Evidence, Section 2376, it is aptly said:—

“Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence? It is ludicrous to observe a chief magistrate, as in *Beatson v. Skene*, solemnly protesting his incompetence to share the knowledge of a fact which had never been secret at all and had for months been spread by the hundred tongues of scandal.”

The distinction between the *Comingore* case (177 U. S., 459) and the case at bar is quite marked. It appears in that case in the statement of fact by Mr. Justice Cullen that by Section 319 of the Revised Statutes of the United States the Secretary of the Treasury was authorized to “prescribe regulations not inconsistent with law for the government of his department.” Here was a direct authorization to the Secretary of the Treasury to promulgate certain rules to carry out the

terms of the act. In the case at bar the Secretary of War and the Adjutant General have undertaken to amend the law which before such attempted amendment gave the registrant the right to inspect any part of the record.

An executive officer under legislative authority to make rules to enforce an act of Congress has no authority to repeal, amend, extend or modify the act. 11,500 Pounds of Butter, 195 Federal 663; 200 Barrels of Whiskey, 95 U. S., 571; U. S. vs. Eaton. 144 U. S., 677.

The District Court in the Comingore case (96 Fed., 557) used this language:—

“The information derived from these reports is not obtained for publication in any manner. It is entirely official. Under this state of facts, it does not seem to the court that these reports are in any sense records open to the use of the public. They are the property of the United States, in the custody of its officers. They are exacted for the sole purpose of collecting revenue. * * * The United States has not authorized the use of these executive documents by anybody for any purpose, except the official one for which the reports were made. No statute is shown which gives the litigant in this case any right to claim the use of this property—the private property of the United States—for any purpose whatever.”

Note 2 to Section 12 expressly provides that the registrant is “entitled to be advised of all statements and allegations which form part of the records in his case.”

No attack is aimed here at the Selective Service law, or any part thereof. The law has been sustained not

only by the courts, from the lowest to the highest, but by the united patriotic public and private sentiment of the entire country. No construction of the law is sought in this proceeding which is in derogation of the law or subversive in the least of its plain intent and purpose. The ruling made by the court below and sought to be sustained here is warranted and directed by the very terms of the Selective Service law. The issue in this case is not any general principle of the inviolability of information furnished Draft Boards, but whether this particular affidavit whose contents are known and whose author is known should be produced before the trial court in Ohio where it is competent and important evidence in a civil action.

It has been commonly supposed that one of the objects of the late war was to do away with that hateful thing known as autocracy. But autocracy, unlimited and uncontrolled power, especially unlimited and uncontrolled military power, is as hateful in a democracy as in a monarchy. It is just such autocratic power the War Department is seeking to uphold in this case, the supremacy of the military power over the civil authorities in time of peace, the unwarranted claim that the courts have not the right to interpret the Selective Service law for the purpose of saying when and under what conditions according to the very terms of the law and the regulations and notes appended thereto, letters and documents in individual draft cases may be produced in response to a lawful subpoena, even going to the length of guarding with the privilege of secrecy those who may conspire by perjured testimony to subject a registrant to a wrong classification.

The pledge of secrecy given by the government in the Selective Service law to those who furnished in-

formation in individual draft cases was clearly intended to be used as a shield for protection and not as a sword for oppression. If it is important to maintain the "economic and domestic equilibrium" of the country by protecting those who furnished confidential information about those registered under that law it is just as vital to teach the lesson that informers must not from motives of spite and hatred give perjured testimony to the great prejudice of registrants, and expect to be protected and upheld in their wrongdoing. It is the paramount right of litigants unless plainly forbidden by law to resort to evidence which it may be in the power of witnesses to produce, for otherwise grave interests might be jeopardized and the administration of justice thwarted. Even where the privilege is strictly applicable the trial court may compel disclosure if it appears necessary in order to avoid the risk of false testimony, or to secure useful testimony, as where one public policy of preserving the privilege is in conflict with another public policy of seeing that justice is done between litigants. The public interest is involved in the administration of justice. The denial of justice to a single suitor is as much a public injury as is the disclosure of any official record. When justice is at stake the appeal to the necessities of the public interest on the other side is of no superior weight. (See Wigmore, Section 2375.)

From time immemorial public officials called on to produce documents in their possession have attempted to determine whether or not they should be produced in response to a subpoena from a court of justice. For practically just as long a period the courts have determined the question of necessity for the secrecy, and not the officials. The cases cited in the brief for

the government show that the courts exercise their discretion in the matter of disclosing privileged communications. The War Department has been a notorious offender against the right of a litigant to inspect papers in its files relating to claims against the government. A citation from Wigmore on Evidence, Section 2374, cited by attorney for appellee in the court below, appears on page 49 of the government brief:—

“If the identity of the informer is known and admitted, then there is no reason for pretended concealment, and the privilege of secrecy would be merely an artificial obstacle to proof.”

The effort made to break the force of this very pertinent citation of law is an admission of its conclusive effect if applicable. There seems to be no reasonable question about its pertinency to the present case. The law does not require vain things and it would be the vainest of vanities to refuse the production of this document whose contents are known and whose author is known when the very Note upon which the government relies gives to registrants the right “to be advised of all statements and allegations which form part of the records in his case.” To say that this affidavit is not one of the “records in his case” seems too much like pettifogging to be worthy of serious consideration.

Note 2 to Section 12 is not part of the Selective Service regulations. If it were it cannot have the effect here claimed for it by the Adjutant General.

The appeal should be dismissed and judgment below affirmed.

FREDERICK C. BRYAN,
Attorney for Appellee.